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No. 79-1917

In the Supreme Court of the United States

OCTOBER TERM, 1979

RUSSELL WILSON CHAPLAIN, SR., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of his two convictions for contempt, for which he was fined a total of $100.

The pertinent facts may be summarized as follows: During proceedings brought by the government in the United States District Court for the Eastern District of Virginia to enforce an Internal Revenue summons issued to petitioner and his daughter for corporate records in their possession, petitioner, appearing *pro se*, interrupted the district judge on at least 18 different occasions, evaded questions by the court, badgered the witnesses, and, in the words of the court of appeals (Pet. App. 3a), "generally refused to observe even minimal requirements of common civility, much less the decorum traditionally expected of participants in judicial proceedings." In the course of petitioner's cross-examination of a witness, the court, after having warned petitioner that his conduct was improper, admonished him to allow the witness to answer

questions without interruption. Petitioner replied: "All right, go ahead. I have all day" (Pet. App. 4a, Tr. 83).[1] The court thereupon adjudged petitioner to be in contempt and fined him $50. A short time later, again after being warned that he was badgering witnesses, petitioner characterized a witness's testimony as stuttering and stammering (Tr. 87). He was again found to be in contempt of court and similarly fined (Tr. 87). The en banc court of appeals affirmed.

1. Petitioner argues (Pet. 6-8) that his conviction is barred by this Court's decision in *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974). There, the defendant was convicted of contempt solely because of his isolated use of a crude expletive in describing an assailant. The state appellate court affirmed the conviction because " '[c]oupling defendant's expletive with the discourteous responses, it is this Court's opinion there was sufficient evidence upon which the trial court *could* find defendant was in direct contempt of court' (emphasis supplied)" (415 U.S. at 698). This Court reversed. It held that the isolated use of the expletive could not constitutionally support the conviction (*ibid.*) and that the state court's reliance on other conduct to sustain the conviction "denied petitioner constitutional due process in sustaining the trial court by treating the conviction as a conviction upon a charge not made" (*id.* at 699).

Here, however, the district court viewed the two incidents as a culmination of continuing misconduct by petitioner during the trial. It accordingly set out the prior events, with supporting record references, in its order. As the court of appeals observed (Pet. App. 2a), petitioner's conduct "posed incredibly difficult problems of control

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[1] "Tr." refers to the transcript of proceedings.

upon the district judge." Contrary to petitioner's suggestion, *Eaton* does not require that each incident must be viewed in isolation from the other incidents that were part of a continuing course of conduct leading up to the contempt citation. Since the trial court repeatedly admonished petitioner that his course of conduct would result in his being held in contempt, and he failed to heed those warnings, the court properly held him to be in contempt. The *en banc* court of appeals was unanimous in this conclusion, and the point does not warrant further review.

2. Petitioner further argues (Pet. 8-10) that the district judge should have disqualified himself from the contempt proceedings. In his view, and in the view of the dissenters on the court of appeals, the judge had become so "embroiled" in the controversy concerning his conduct at trial that his impartiality had become impaired. See *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971); *Taylor* v. *Hayes*, 418 U.S. 488 (1974). But as this Court observed in *Mayberry*, *supra*, 400 U.S. at 465, "not every attack on a judge * * * disqualifies him from sitting." Here, while annoying and improper, petitioner's conduct did not amount to "brazen efforts to denounce, insult, and slander the court" so as to embroil the judge in a personal dispute with him. Compare *id.* at 462. Petitioner's malice was directed toward the Internal Revenue Service and its agents rather than to the court. It was petitioner's badgering of the witnesses and his refusal to permit the witnesses to answer the questions put to them that led the district court to warn him of the possibility of contempt (Tr. 83-87). Moreover, it is quite clear that the judge's admonitions had had no effect and that if petitioner had been permitted to continue his conduct unpunished, the proceedings might have been entirely disrupted.

Under these circumstances, the district court judge was entitled to impose summary contempt sanctions in an effort to restore order to the proceedings and was not obliged to disqualify himself and refer the contempt question for trial before another judge. In any event, the point of disagreement between the majority and the dissent in the court of appeals regarding whether the record of this case reflected a disqualifying "embroilment" by the district judge is a fact-specific controversy not warranting review by this Court.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1980

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[2]Petitioner refers (Pet. 10) to the court's negative response to his question whether he could appeal the contempt citation. It appears, however, that petitioner first asked whether he could appeal without paying the fine (see Tr. 83-84). Subsequently, petitioner renewed his question and was told he could appeal (Tr. 118).

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